CITATIONS

	Page
Albaugh v. Tawes, 233 F.Supp. 576 (D. Md.), Aff'd, 379 U.S. 27	fn.1, 2
Baker v. Carr, 369 U.S. 186	4
Binns v. United States, 194 U.S. 486	3
District of Columbia v. Thompson, 346 U.S. 100, 109	3
Evans, et al. v. Cornman, et al., No. 236, October Term, 1969, U.S. Supreme Court	1, 7
Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 529-30, 537	2
O'Donoghue v. United States, 289 U.S. 516, 538-539	3
Paul v. United States, 371 U.S. 245	2
CONSTITUTIONAL PROVISIONS:	
Article I, Section 8, Clause 17, United States Constitution	1, 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 631

DAVID CARLINER, MARY ELLEN CARTER GROGAN, WILHELMINA VINCEL HETZEL, ARTHUR W. JACKSON, ROBERT GRAYSON McGUIRE, JR., and WILLIAM WARFIELD ROSS, Petitioners

v.

COMMISSIONER OF THE DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA COUNCIL, et al., Respondents

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Since the petition for a writ of certiorari was filed, this Court has noted jurisdiction in *Evans, et al. v. Cornman, et al.*, No. 236, October Term, 1969, in which one of the principal issues is identical to those presented here and in which the constitutional clause is para materia.

1. The issue in No. 236 includes the question whether the State of Maryland may deprive twelve residents of a federal reservation, namely, the inhabitants on the grounds of the National Institutes of Health in Montgomery County, of the right to vote. See Appellants' Jurisdictional Statement, p. 3.

The provision of the Constitution involved is Article I, Section 8, Clause 17 which vests in Congress the power to "exercise exclusive Legislation" over the District of Colum-

bia and to "exercise like Authority over all Places purchased. . .for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings".

In recognition of its unambiguous language, this Court has previously observed that "the power of Congress over federal enclaves that come within the scope of Art. I, Sec. 8, cl. 17 is obviously the same as the power of the Congress over the District of Columbia". *Paul v. United States*, 371 U.S. 245. See also *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 529-30, 537.

The decision of the three-judge district court in No. 236 and this Court's action to note jurisdiction of the appeal from that decision would appear to be holdings that whether there is a right to vote on federal reservations does indeed present a substantial constitutional question.[1] If it is so for a total of 12 persons who reside on the grounds of the National Institutes of Health, it cannot be less so when the right involves several hundred thousand citizens of the capital city of the nation.

2. The Brief for the Respondents in Opposition has misconceived the issue presented here. It is not at all whether "Congress has historically engaged in an unconstitutional usurpation of power whenever it enacted local measures in the exercise of its exclusive legislative authority over the District of Columbia" or whether its power is "plenary" (Br. 2). No such questions are raised here.

The question is, granted the authority, whether it may be exercised to deprive the citizens of the District of Columbia of the right to elect those municipal officers, who in all other cities in the United States are chosen by the suffrage of the people.

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[1] See also *Albaugh v. Tawes*, 233 F.Supp. 576 (D. Md.), aff'd, 379 U.S. 27, in which a three-judge court held that the right of the residents of the District of Columbia to vote for a United States Senator from Maryland posed a substantial constitutional question, while deciding adversely, and was affirmed both on the jurisdiction and the merits by this Court.

The decisions of this Court relied upon by the respondents do not pretend to answer this question, much less do they dispose of it so as to make the constitutional claims here "wholly insubstantial" (Br. 2). To the contrary, the cases cited by the respondents underscore petitioners' argument that the exercise of any power by Congress over the District of Columbia is subject to constitutional limitations.

Thus, *District of Columbia v. Thompson*, 346 U.S. 100, 109, which sustained the power of the last elected Legislative Assembly of the District of Columbia to forbid racial discrimination, held that "there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitation to which all lawmaking is subservient. . ."[2]

Similarly, *O'Donoghue v. United States*, 289 U.S. 516, 538, 539, while referring to the "unqualified grant of permanent legislative power" to the Congress by the Constitution, cautioned that such a grant "does not authorize a denial to the inhabitants (of the District of Columbia) of any constitutional guaranty not plainly inapplicable" (539), and "is subject to the guaranties of personal liberty in the Amendments and in the original Constitution" (545-546).

And *Binns v. United States*, 194 U.S. 486, cited at length by respondents (Br. 3-4), refers to the "plenary power" which Congress has over the District of Columbia *"save as controlled by the provisions of the Constitution"*. (491).

In sum, respondents, like the Court of Appeals below, conspicuously have failed to address themselves to the issues presented by the complaint, and their brief, like the opinion of the court below, is bereft of any treatment of the land-

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[2]The language underlined by respondents (Br. 4), that the delegation of power is "subject also to the power of Congress at any time to revise, alter, or revoke the authority granted", plainly relates to the legislative powers granted to the District of Columbia and not to the constitutional limitations upon powers exercised by Congress itself.

mark decisions of this Court dealing with the right of suffrage since *Baker v. Carr*, 369 U.S. 186.

3. Neither have the respondents treated the question of jurisdiction. In its decision to note jurisdiction of the appeal in *Evans v. Cornman*, this Court appears to be holding, in effect, that the specific ground of the decision of the Court of Appeals below—that "the constitutional claims are insubstantial" (Petition, App. A, 32) is incorrect. If this is so, then summary reversal of the decision below would be in order.

Respectfully submitted,

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